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PRABAH SINNATHAMBY &amp; ANOR

v.

PP

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HIGH COURT MALAYA, SHAH ALAM  
AKHTAR TAHIR J  
[CRIMINAL APPEAL NO: 45C-270-2011]  
29 OCTOBER 2012

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**CRIMINAL PROCEDURE:** *Sentencing - Kidnapping - Factors to be considered in sentencing - Gravity of offence - Whether accused persons showed remorse - Whether deterrent sentence warranted - Whether sentence of imprisonment warranted*

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The two accused persons in this case were charged on two charges, one being the main charge under s. 3 of the Kidnapping Act 1961 ('the Act') punishable under s. 34 of the Penal Code ('the Code') and the other, an alternative charge under s. 365 of the Code punishable under the same. Both accused pleaded guilty to the alternative charge. The facts showed a well planned sinister plot to kidnap the victim for purposes of ransom.

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**Held (sentencing first accused to seven years' imprisonment and second accused to five years' imprisonment):**

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(1) The gravity of an offence can be diminished if there is a reason for the commission of the offence or there was a temptation to commit the offence. In the present case, there was no suggestion of any temptation apart from sheer greed in carrying out the offence by the accused and indeed the carrying out of the offence showed a high degree of wickedness uncommon to normal man. (paras 6 & 7)

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(2) There were no factors of mitigation that favoured the first accused. The guilty plea of the first accused was of no significance compared to the heinous nature of the crime and it was not shown that he had repented his action. The public interest required a deterrent sentence especially since the first accused was a repeat offender. Hence a punishment severe enough to deter him in future and at the same time deter other people with similar tendencies was necessary; *PP v. Govinden Chinden Nair* (foll). (paras 11 & 12)

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- (3) The second accused played a less substantial role than the first accused. He had pleaded guilty and had shown remorse. Although the second accused deserved a less severe punishment than the first accused, the role played by the second accused was necessary for the offence to be completed. Hence, a sentence of imprisonment was necessary *albeit* a shorter term than that of the first accused. (paras 15 & 16)

**Case(s) referred to:**

*PP v. Govindnan Chinden Nair* [1998] 2 CLJ 370 HC (*foli*)

*For the appellants - M/s Azzat & Izzat*

*For the prosecution - Yong Leow Shin; DPP*

*Reported by S Barathi*

## JUDGMENT

**Akhtar Tahir J:**

[1] This case has two accused and they faced two charges one being the main charge and the other being an alternative charge. The charges are as follows:

**Main Charge**

Bahawa kamu bersama-sama dengan 5 orang yang masih bebas pada 25 Januari 2011 jam lebih kurang 8.30 pagi, di tepi Lorong Melati 3/25, Bandar Melawati, Kuala Selangor, dalam Daerah Kuala Selangor dalam Negeri Selangor Darul Ehsan, bagi mencapai niat bersama kamu semua telah melakukan culik dengan niat untuk menahan Wong Yoke Sang (No. K/P: 580215-05-5097) bagi maksud tebusan sebanyak RM500,000.00, telah melakukan satu kesalahan di bawah seksyen 3 Akta Culik 1961(Akta 365) dan boleh dihukum di bawah seksyen yang sama dibaca bersama dengan seksyen 34 Kanun Keseksaan.

**Alternative Charge**

Bahawa kamu bersama-sama dengan 5 orang yang masih bebas pada 25 Januari 2011 jam lebih kurang 8.30 pagi, di tepi Lorong Melati 3/25, Bandar Melawati, Kuala Selangor, dalam Daerah Kuala Selangor dalam Negeri Selangor Darul Ehsan, bagi mencapai niat bersama kamu semua telah melakukan culik dengan

- A     niat untuk menahan Wong Yoke Sang (No. K/P: 580215-05-5097) dengan niat untuk menyebabkan Wong Yoke Sang (No. KP: 580215-05-5097) dikurung secara rahsia dan secara salah. Oleh itu kamu telah melakukan suatu kesalahan di bawah seksyen 365 Kanun Keseksaan dan boleh dihukum di bawah seksyen yang sama dibaca bersama dengan seksyen 34 Kanun Keseksaan.
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- [2] Both the accused pleaded guilty to the alternative charge against them after both the charges were read and explained to them in Tamil. Both the accused understood the nature and consequence of their plea of guilt to the alternative charge. The facts of the case were then read and explained to both the accused in Tamil and both understood the facts and admitted unequivocally to the facts of the case. They also admitted to all the other exhibits which included the photographs and sketch plan of the place of offence.
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- [3] After considering the facts of the case and the exhibits tendered and being satisfied that both the accused had voluntarily pleaded guilty and admitted to the facts and exhibits to the alternative charge I accepted the plea of guilt of both the accused and found them guilty of the alternative charge.
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- [4] After hearing mitigation on their behalf I sentenced the 1st accused to seven years imprisonment and the 2nd accused to five years imprisonment. Both the accused have appealed against the sentence imposed upon them.
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- [5] The factor which struck me most in the imposing of the sentence against both the accused was the gravity of the offence. The gravity of the offence was reflected in the narration of the fact as tendered by the prosecution. The facts showed a well planned sinister plot to kidnap the victim for purposes of ransom. The ransom sum demanded was a substantial sum of RM1.5 million which was subsequently reduced to RM500,000.
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- [6] The gravity of an offence can be diminished if there is a reason for the commission of the offence or there was a temptation to commit the offence. Edgar Joseph Jr J (as His Lordship then was) stated as follows:
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Generally speaking the presence of temptation diminishes the gravity of the offence because it supplies an explanation as to why the offence was committed which does not imply a high degree of wickedness on the part of the offender; it suggests the possibility that the strong temptation was such as to overwhelm reasonably normal controls.

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[7] In this case there was no suggestion of any temptation apart from sheer greed in carrying out the offence by the accused and indeed the carrying out of the offence showed a high degree of wickedness uncommon to normal man.

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[8] The facts as tendered by the prosecution revealed that the 1st accused was the mastermind behind the kidnapping. It was the 1st accused who had planned and assigned the duties to the other co conspirators in carrying out the kidnapping.

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[9] The role played by the 2nd accused was stated in para. 26 of the facts of the case and read as follows:

Hasil soal siasat polis mendedahkan OKT2 diarahkan OKT1 untuk menjaga line semasa penculikan. OKT2 diarahkan oleh OKT1 untuk membawa kereta Mercedes Benz bersama OKT1 dan ikut belakang kereta Iswara yang dipandu oleh orang dengan nama panggilan Raja, Nava, Aya dan pendek yang akan menculik mangsa di Kuala Selangor.

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[10] Further involvement of OKT2 was stated in para. 31 of the facts as follows:

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OKT1 dan 2 mengaku telah membuat panggilan untuk meminta wang tebusan dari keluarga dan kemudian pergi mengambil wang tebusan di KM 184 Jalan Jasin-Bemban.

[11] To me there were no factors of mitigation that favoured the 1st accused. The fact that the 1st accused had pleaded guilty was of no significance compared to the heinous nature of the crime. By pleading guilty it could not also be shown that the 1st accused had repented his action. This could be seen from the fact that the 1st accused had earlier been implicated and convicted of another kidnapping using the same *modus*.

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[12] In this case apart from the gravity of the offence public interest required a deterrent sentence especially since the 1st accused was a repeat offender and a punishment severe enough to deter him in future was necessary. The sentence should also deter other people with similar tendencies.

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- A [13] In the case *PP v. Govindnan Chinden Nair* [1998] 2 CLJ 370 Augustine Paul JC (as His Lordship then was) stated thus:

- B In passing sentences public interest must necessarily be one of the prime considerations. A major element of public interest is that justice means justice not only to the accused but also to society. Accordingly, in passing sentence a court has to consider not only the offence and the offender but also the interest of society. Where a person is found to be a persistent offender then it is in the interests of justice that a deterrent sentence should be passed.
- C An accused person should be given credit or discount for pleading guilty, but the severity of the offence committed may outweigh the mitigating effect of a guilty plea. Thus, there can be no automatic rule that a guilty plea on its own entitles an accused to a lesser punishment.
- D In the case before the court the learned magistrate, in imposing the sentence, had placed undue emphasis on the guilty plea of the accused. His opinion that a lenient sentence must be imposed following a guilty plea was wrong in law. He had completely overlooked the element of a public interest to be served in dealing with a persistent offender like the accused. In the court's opinion
- E the string of previous convictions of the accused had reached such a point that the mitigating factors in his favour had been exhausted. His involvement in crime immediately after coming out of prison, after having served a five-year term, indicated his difficulty in reforming. In his own interest it was best that he re-
- F entered prison for the longest period possible. In the premises, it was the court's view that, that was a proper case where the learned magistrate ought to have acted under s. 87(2) of the Act. Therefore the prison term imposed on the accused was varied and substituted with an order of imprisonment for seven years.
- G [14] In considering the above factors the 1st accused certainly deserved the maximum punishment for the offence and in fact a more severe punishment than the maximum if there was one. The seven years imprisonment was a lenient sentence when compared to the circumstances of the case.
- H [15] The factors which favoured the 2nd accused were that he had pleaded guilty to the charge and had shown remorse for his actions. Further the role played by the 2nd accused was less substantial than that played by the 1st accused. I therefore felt
- I that the 2nd accused deserved a less severe punishment than the 1st accused.

[16] Nevertheless the factors in favour of the 2nd accused could not deviate from the fact that the role played by the 2nd accused was necessary for the offence to be completed and the court could not ignore this fact. I therefore felt that a sentence of imprisonment was necessary *albeit* of a shorter term than that of the 1st accused.

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[17] The defence counsel had at length submitted on the medical condition of the 2nd accused which showed that in detention due to being deprived of proper medication the 2nd accused had lost his eyesight due to the illness he was suffering.

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[18] To me this could be divine retribution but certainly not a factor not to imprison the 2nd accused. I took into account that at the time of the commission of the crime the 2nd accused was healthy and in fact the lookout man. It is ironic that now he is blind.

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[19] In the circumstances of the case five years imprisonment imposed upon the 2nd accused is not manifestly excessive and in fact is lenient compared to the gallows the 2nd accused could have faced if the prosecution had not offered the alternative charge.

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